

CERTIFICATION OF ENROLLMENT
SUBSTITUTE SENATE BILL 5449

59th Legislature
2005 Regular Session

Passed by the Senate April 18, 2005
YEAS 41 NAYS 6

President of the Senate

Passed by the House April 11, 2005
YEAS 67 NAYS 29

Speaker of the House of Representatives

Approved

Governor of the State of Washington

CERTIFICATE

I, Thomas Hoemann, Secretary of the Senate of the State of Washington, do hereby certify that the attached is **SUBSTITUTE SENATE BILL 5449** as passed by the Senate and the House of Representatives on the dates hereon set forth.

Secretary

FILED

**Secretary of State
State of Washington**

SUBSTITUTE SENATE BILL 5449

AS AMENDED BY THE HOUSE

Passed Legislature - 2005 Regular Session

State of Washington 59th Legislature 2005 Regular Session

By Senate Committee on Water, Energy & Environment (originally sponsored by Senators Poulsen, Swecker, Pridemore, Kline, Fraser and Rockefeller)

READ FIRST TIME 03/02/05.

1 AN ACT Relating to providing the department of ecology with lien
2 authority to facilitate the recovery of remedial action costs; amending
3 RCW 70.105D.050 and 70.105D.060; and adding a new section to chapter
4 70.105D RCW.

5 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

6 NEW SECTION. **Sec. 1.** A new section is added to chapter 70.105D
7 RCW to read as follows:

8 (1) It is in the public interest for the department to recover
9 remedial action costs incurred in discharging its responsibility under
10 this chapter, as these recovered funds can then be applied to the
11 cleanup of other facilities. Thus, in addition to other cost-recovery
12 mechanisms provided under this chapter, this section is intended to
13 facilitate the recovery of state funds spent on remedial actions by
14 providing the department with lien authority. This will also prevent
15 a facility owner or mortgagee from gaining a financial windfall from
16 increased land value resulting from department-conducted remedial
17 actions at the expense of the state taxpayers.

18 (2) If the state of Washington incurs remedial action costs

1 relating to a remedial action of real property, and those remedial
2 action costs are unrecovered by the state of Washington, the department
3 may file a lien against that real property.

4 (a) Except as provided in (c) of this subsection, liens filed under
5 this section shall have priority in rank over all other privileges,
6 liens, monetary encumbrances, or other security interests affecting the
7 real property, whenever incurred, filed, or recorded, except for the
8 following liens:

9 (i) Local and special district property tax assessments; and

10 (ii) Mortgage liens recorded before liens or notices of intent to
11 conduct remedial actions are recorded under this section.

12 (b) Liens filed pursuant to (a) and (c) of this subsection shall
13 not exceed the remedial action costs incurred by the state.

14 (c)(i) If the real property for which the department has incurred
15 remedial action costs is abandoned, the department may choose to limit
16 the amount of the lien to the increase in the fair market value of the
17 real property that is attributable to a remedial action conducted by
18 the department. The increase in fair market value shall be determined
19 by subtracting the county assessor's value of the real property for the
20 most recent year prior to remedial action being initiated from the
21 value of the real property after remedial action. The value of the
22 real property after remedial action shall be determined by the bona
23 fide purchase price of the real property or by a real estate appraiser
24 retained by the department. Liens limited in this way have priority in
25 rank over all other privileges, liens, monetary encumbrances, or other
26 security interests affecting the real property, whenever incurred,
27 filed, or recorded.

28 (ii) For the purposes of this subsection, "abandoned" means there
29 has not been significant business activity on the real property for
30 three years or property taxes owed on the real property are three years
31 in arrears prior to the department incurring costs attributable to this
32 lien.

33 (d) The department shall, when notifying potentially liable persons
34 of their potential liability under RCW 70.105D.040, include a notice
35 stating that if the department incurs remedial action costs relating to
36 the remediation of real property and the costs are not recovered by the
37 department, the department may file a lien against that real property
38 under this section.

1 (e) Except for emergency remedial actions, the department must
2 provide notice to the following persons before initiating remedial
3 actions conducted by persons under contract to the department on real
4 property on which a lien may be filed under this section:

5 (i) The real property owner;

6 (ii) Mortgagees;

7 (iii) Lienholders of record;

8 (iv) Persons known to the department to be conducting remedial
9 actions at the facility at the time of such notice; and

10 (v) Persons known to the department to be under contract to conduct
11 remedial actions at the facility at the time of such notice.

12 For emergency remedial actions, this notice shall be provided
13 within thirty days after initiation of the emergency remedial actions.

14 (f) The department may record a copy of the notice in (e) of this
15 subsection, along with a legal description of the property on which the
16 remedial action will take place, with the county auditor in the county
17 where the real property is located. If the department subsequently
18 files a lien, the effective date of the lien will be the date this
19 notice was recorded.

20 (3) Before filing a lien under this section, the department shall
21 give the owner of real property on which the lien is to be filed and
22 mortgagees and lienholders of record a notice of its intent to file a
23 lien:

24 (a) The notice required under this subsection (3) must be sent by
25 certified mail to the real property owner and mortgagees of record at
26 the addresses listed in the recorded documents. If the real property
27 owner is unknown or if a mailed notice is returned as undeliverable,
28 the department shall provide notice by posting a legal notice in the
29 newspaper of largest circulation in the county the site is located.
30 The notice shall provide:

31 (i) A statement of the purpose of the lien;

32 (ii) A brief description of the real property to be affected by the
33 lien;

34 (iii) A statement of the remedial action costs incurred by the
35 state related to the real property affected by the lien;

36 (iv) A brief statement of facts showing probable cause that the
37 real property is the subject of the remedial action costs incurred by
38 the department; and

1 (v) The time period following service or other notice during which
2 any recipient of the notice whose legal rights may be affected by the
3 lien may comment on the notice.

4 (b) Any comments on the notice must be received by the department
5 on or before thirty days following service or other provision of the
6 notice of intent to file a lien.

7 (c) If no comments are received by the department, the lien may be
8 filed on the real property immediately.

9 (d) If the department receives any comments on the lien, the
10 department shall determine if there is probable cause for filing the
11 certificate of lien. If the department determines there is probable
12 cause, the department may file the lien. Any further challenge to the
13 lien may only occur at the times specified under RCW 70.105D.060.

14 (e) If the department has reason to believe that exigent
15 circumstances require the filing of a lien prior to giving notice under
16 this subsection (3), or prior to the expiration of the time period for
17 comments, the department may file the lien immediately. For the
18 purposes of this subsection (3), exigent circumstances include, but are
19 not limited to, an imminent bankruptcy filing by the real property
20 owner, or the imminent transfer or sale of the real property subject to
21 lien by the real property owner, or both.

22 (4) A lien filed under this section is effective when a statement
23 of lien is filed with the county auditor in the county where the real
24 property is located. The statement of lien must include a description
25 of the real property subject to lien and the amount of the lien.

26 (5) Unless the department determines it is in the public interest
27 to remove the lien, the lien continues until the liability for the
28 remedial action costs have been satisfied through sale of the real
29 property, foreclosure, or other means agreed to by the department. Any
30 action for foreclosure of the lien shall be brought by the attorney
31 general in a civil action in the court having jurisdiction and in the
32 manner prescribed for the judicial foreclosure of a mortgage.

33 (6)(a) This section does not apply to real property owned by a
34 local government or special purpose district or real property used
35 solely for residential purposes and consisting of four residential
36 units or less at the time the lien is recorded. This limitation does
37 not apply to illegal drug manufacturing and storage sites under chapter
38 64.44 RCW.

1 (b) If the real property owner has consented to the department
2 filing a lien on the real property, then only subsection (3)(a)(i)
3 through (iii) of this section requiring notice to mortgagees and
4 lienholders of record apply.

5 **Sec. 2.** RCW 70.105D.050 and 2002 c 288 s 4 are each amended to
6 read as follows:

7 (1) With respect to any release, or threatened release, for which
8 the department does not conduct or contract for conducting remedial
9 action and for which the department believes remedial action is in the
10 public interest, the director shall issue orders or agreed orders
11 requiring potentially liable persons to provide the remedial action.
12 Any liable person who refuses, without sufficient cause, to comply with
13 an order or agreed order of the director is liable in an action brought
14 by the attorney general for:

15 (a) Up to three times the amount of any costs incurred by the state
16 as a result of the party's refusal to comply; and

17 (b) A civil penalty of up to twenty-five thousand dollars for each
18 day the party refuses to comply.

19 The treble damages and civil penalty under this subsection apply to all
20 recovery actions filed on or after March 1, 1989.

21 (2) Any person who incurs costs complying with an order issued
22 under subsection (1) of this section may petition the department for
23 reimbursement of those costs. If the department refuses to grant
24 reimbursement, the person may within thirty days thereafter file suit
25 and recover costs by proving that he or she was not a liable person
26 under RCW 70.105D.040 and that the costs incurred were reasonable.

27 (3) The attorney general shall seek, by filing an action if
28 necessary, to recover the amounts spent by the department for
29 investigative and remedial actions and orders, and agreed orders,
30 including amounts spent prior to March 1, 1989.

31 (4) The attorney general may bring an action to secure such relief
32 as is necessary to protect human health and the environment under this
33 chapter.

34 (5)(a) Any person may commence a civil action to compel the
35 department to perform any nondiscretionary duty under this chapter. At
36 least thirty days before commencing the action, the person must give

1 notice of intent to sue, unless a substantial endangerment exists. The
2 court may award attorneys' fees and other costs to the prevailing party
3 in the action.

4 (b) Civil actions under this section and RCW 70.105D.060 may be
5 brought in the superior court of Thurston county or of the county in
6 which the release or threatened release exists.

7 (6) Any person who fails to provide notification of releases
8 consistent with RCW 70.105D.110 or who submits false information is
9 liable in an action brought by the attorney general for a civil penalty
10 of up to five thousand dollars per day for each day the party refuses
11 to comply.

12 (7) Any person who owns real property or lender holding a mortgage
13 on real property that is subject to a lien filed under section 1 of
14 this act may petition the department to have the lien removed or the
15 amount of the lien reduced. If, after consideration of the petition
16 and the information supporting the petition, the department decides to
17 deny the request, the person may, within ninety days after receipt of
18 the department's denial, file suit for removal or reduction of the
19 lien. The person is entitled to removal of a lien filed under section
20 1(2)(a) of this act if they can prove by a preponderance of the
21 evidence that the person is not a liable party under RCW 70.105D.040.
22 The person is entitled to a reduction of the amount of the lien if they
23 can prove by a preponderance of the evidence:

24 (a) For liens filed under section 1(2)(a) of this act, the amount
25 of the lien exceeds the remedial action costs the department incurred
26 related to cleanup of the real property; and

27 (b) For liens filed under section 1(2)(c) of this act, the amount
28 of the lien exceeds the remedial action costs the department incurred
29 related to cleanup of the real property or exceeds the increase of the
30 fair market value of the real property solely attributable to the
31 remedial action conducted by the department.

32 **Sec. 3.** RCW 70.105D.060 and 1994 c 257 s 13 are each amended to
33 read as follows:

34 The department's investigative and remedial decisions under RCW
35 70.105D.030 and 70.105D.050, its decisions regarding filing a lien
36 under section 1 of this act, and its decisions regarding liable persons
37 under RCW 70.105D.020(~~((8) and))~~ (16), 70.105D.040, 70.105D.050, and

1 section 1 of this act shall be reviewable exclusively in superior court
2 and only at the following times: (1) In a cost recovery suit under RCW
3 70.105D.050(3); (2) in a suit by the department to enforce an order or
4 an agreed order, or seek a civil penalty under this chapter; (3) in a
5 suit for reimbursement under RCW 70.105D.050(2); (4) in a suit by the
6 department to compel investigative or remedial action; (~~and~~) (5) in
7 a citizen's suit under RCW 70.105D.050(5); and (6) in a suit for
8 removal or reduction of a lien under RCW 70.105D.050(7). Except in
9 suits for reduction or removal of a lien under RCW 70.105D.050(7), the
10 court shall uphold the department's actions unless they were arbitrary
11 and capricious. In suits for reduction or removal of a lien under RCW
12 70.105D.050(7), the court shall review such suits pursuant to the
13 standards set forth in RCW 70.105D.050(7).

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